

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**SUPPLEMENTAL BRIEF OF APPELLANTS
RE: SECOND AMENDMENT ISSUES**

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CORPORATE DISCLOSURE STATEMENT

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

Dated: September 10, 2008

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INTRODUCTION

Plaintiff/Appellants have been foreclosed from pleading a Second Amendment claim based on circuit precedent. See: Hickman v. Block, 81 F.3d 98 (1996), *cert. denied*, 519 U.S. 912 (1996). See also: Nordyke v. King (“Nordyke III”), 319 F.3d 1185 (2003).

All that changed when the United States Supreme Court issued an opinion affirming the “individual rights” interpretation of the Second Amendment: District of Columbia v. Heller; 554 U.S. ___, 128 S.Ct. 2783, 171 L. Ed. 2d 637 (2008).

JURISDICTION

As this is a supplemental brief, Plaintiff/Appellants rely upon the statement of jurisdiction set forth in their principal brief.

This panel has authority to overturn prior panel interpretations of the Second Amendment that have been undermined by intervening Supreme Court precedent. See: E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 744, n.1 (2003) (*en banc*); Miller v. Gammie, 335 F.3d 889, 899-900 (2003) (*en banc*); See also: Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1090 (2007).

"[T]he issues decided by the higher court *need not be identical* in

order to be controlling. Rather, the [Supreme Court] must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” Gammie, 335 F.3d at 900 (emphasis and brackets added).

The circuit courts are also bound by the “mode of analysis” of the holdings of Supreme Court decisions. *See: In re Stern*, 345 F.3d 1036, 1043 (2003).

STATEMENT OF ISSUES

To what extent does Heller, 554 U.S. ____ modify and/or overturn the Ninth Circuit’s decisions in: Hickman, 81 F.3d at 98; and Silveira v. Lockyer, 312 F.3d 1052 (2002); thereby compelling reversal of the District Court’s February 14, 2005 order denying Plaintiff/Appellants’ motion for leave to amend their complaint to add a Second Amendment claim?

Does the Second Amendment apply to state action through the 14th Amendment “due process” clause¹; which necessarily implies that this panel revisit the issues raised in a prior case: Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 724 (1992)?

¹ U.S. Const. amend. XIV, § 1.

Can the artificial distinctions which the County’s ordinance (and actions) make as between gun shows and other events at the Alameda County Fairgrounds, survive the “strict scrutiny” of 14th Amendment equal protection that is required when the government discriminates against the exercise of a fundamental right? *See generally: McDonald v. Board*, 394 U.S. 802, 809 (1969); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

Does the Second Amendment right, as defined in *Heller*, 554 U.S. ___, alter the First Amendment² analysis of this case, assuming that *United States v. O’Brien*, 391 U.S. 367 (1968) is the correct case to analyze symbolic speech under the facts of this case?

² This brief addresses the Second Amendment. The Appellants’ principal brief addresses the tests set forth in *United States v. O’Brien*, 391 U.S. 367 (1968) (at pp. 45 - 55) as they apply to this case. We simply note here that the symbolic speech analysis under *O’Brien* (if this case is not analyzed under *Texas v. Johnson*, 491 U.S. 397 (1989)) is necessarily altered by a finding that possession of firearms is also a protected activity under the Second Amendment.

STANDARD OF REVIEW

Denial of Leave to Amend

The denial of leave to amend after a responsive pleading has been filed is reviewed for abuse of discretion. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (2002); *See also: In re Vantive Corp. Secur. Litig.*, 283 F.3d 1079, 1097 (2002). Nonetheless, because of the strong policy favoring leave to amend, denials of leave to amend are “strictly” reviewed. *See: Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (1996).

Dismissal of a claim without leave to amend is improper “*unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.*” *See: Gompper*, 298 F.3d at 898 (emphasis added; internal quotes omitted). *See also: Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 879 (1999).

Appeal from Adverse Summary Judgment

With respect to the Second Amendment’s effect on Appellants’ First and Fourteenth Amendment claims, which were disposed of as part the trial court’s summary judgment order, the standard of review is *de novo*. *Lovell v. Chandler*, 303 F.3d 1039 (2002).

In conducting a *de novo* review, the Ninth Circuit does not defer to the lower court’s ruling, but independently considers the matter anew, as if no decision had been rendered on the matter below. Voigt v. Savell, 70 F.3d 1552, 1564 (1995); *see also*: Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 970 (2003) – “no form of appellate deference is acceptable.”

The appellate court is not required “merely to choose between the opposing interpretations offered by the parties” in interpreting a statute *de novo*. Astaire v. Best Film & Video Corp., 136 F.3d 1208, 1208 (1998).

Plaintiff/Appellants were the nonmoving party in the trial court and are therefore entitled to have all factual inferences decided in their favor. Ventura Packers, Inc. v. F/V JEANINE KATHLEEN, 305 F.3d 913 (2002).

STATEMENT OF THE CASE

As this is a supplement brief on limited issues, we respectfully refer this Court to the Statement of the Case that is set forth in Plaintiff/Appellants’ principal brief.

STATEMENT OF FACTS

As this is a supplemental brief on limited issues, we set forth only the facts in the current record relating to the Second Amendment.

The parties filed a JOINT STATEMENT OF UNDISPUTED FACTS (JSUF) in the trial court. That statement of facts is found in the Excerpt of Record (ER), Vol.: III of IV, Tab: 12, pp. 0438 to 0456. For ready reference and the convenience of the Court, a copy is set forth in the appendix to this brief as Attachment A. Hereafter, the document will be referred to simply as the JSUF.

The Plaintiff/Appellants are promoters, patrons, and exhibitors of gun shows that took place at the Alameda County Fairgrounds from 1991 to 1999. [JSUF, ¶¶ 43,44.] Thus Appellants’ activities, including First and Second Amendment activities at the Fairgrounds, were an established and entrenched exercise of rights for almost a decade before the county passed its ordinance burdening their rights in Aug/Sept of 1999. [JSUF, ¶¶ 13, 22]

Gun shows are places where gun dealers are permitted to “conduct business,” including sales of firearms, away from their licensed premises. 27 C.F.R. § 478.100(a)(1) (1998). “Gun show[s]” are further defined in Title 27 of the *Code of Federal Regulations* as:

A gun show or an event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.³

It is an undisputed fact that violent crimes have never occurred, nor have there been violations of any federal and/or state firearms laws at the Plaintiff/Appellants' guns shows. [JSUF, ¶¶ 43, 44]

The County has sought to obscure these facts by constantly referring to a July 4, 1998 incident, in which Jamai Johnson brought a handgun – not to a gun show but – to the county fair at the Alameda County Fairgrounds. He shot several people, and several more people were injured in the ensuing panic and confusion. The annual county fair is not in any way connected with the gun shows hosted/attended by the Plaintiff/Appellants. Jamai Johnson was arrested and convicted for these crimes and was sentenced to state prison. [JSUF, ¶¶ 1,2,3]

Underscoring that the challenged Ordinance is only tenuously connected to that shooting, almost a year later, (May 20, 1999) Mary V. King, a member of the Defendant/Appellees' Board of Supervisors, sent a memorandum to county counsel with copies to her fellow board

³ 27 C.F.R. § 478.100(b).

members. The memo asked Mr. Winnie (county counsel) to find some legal way to prohibit gun shows on county property. The memorandum sets forth the specific intent of the board – based on political philosophy – to take steps to deny gun shows access to county property. [JSUF, ¶ 9, see also attachment F to Appellants’ principal brief.]

The County, speaking through Supervisor King, issued a press release one month later. That press release reiterated that the purpose of the pending legislation was to deny gun shows access to the fairgrounds because the board members dislike the political and social values of the people attending gun shows. The County’s stated motivation was to eliminate the fairgrounds as “*a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.*” (italics added for emphasis) [JSUF, ¶ 11, see also Attachment G, to Appellants’ principal brief.]

On July 26, 1999, Plaintiff/Appellants’ counsel sent a letter to County Counsel requesting clarification of the proposed Ordinance and specifically requesting an interpretation of the Ordinance as it would relate to gun shows at the Alameda Fairgrounds. [JSUF, ¶ 12] This and subsequent correspondence went unanswered. It is reasonable to infer that the County was on notice that the Ordinance infringed the

Appellants’ First and Second Amendment activities at the gun shows.
(i.e., The Ordinance’s impact on gun shows was not incidental.)

On August 17, 1999, The Board of Supervisors adopted Ordinance No.: 0-2000-11 (“Ordinance”), which later became Section 9.12.120 of the Code of Alameda County.⁴ On its face, that Ordinance prohibits the possession of guns on county property, including the fairgrounds where Appellants had been hosting their gun shows for almost a decade. In a display of cognitive dissonance, the County sent a letter to the General Manager of the Fairgrounds on August 23, 1999 “explaining” that the Ordinance does not proscribe gun shows – so long as no guns are present at gun shows. [JSUF, ¶¶ 13,14]

On September 7, 1999, the General Manager of the fairgrounds demanded a written plan from the Appellants, asking that they explain how they would conduct their gun shows in compliance with the Ordinance (i.e., without firearms). [JSUF, ¶ 15] Nothing in the Ordinance requires the submission of such a plan.

In the mean time, the Scottish Caledonian Games contacted the County, and apparently inquired about an amendment to the Ordinance so they could continue to hold cultural events at the

⁴ County of Alameda, Cal., Gen. Code § 9.12.120 (1999).

fairgrounds involving the possession and display of firearms. To date, the Scottish Caledonian Games continue to bring, possess and keep firearms on to the fairgrounds, and have never been required to submit a written plan for conducting their cultural events (with or without firearms) in compliance with the Ordinance. [JSUF ¶¶ 15,16,17,31]

The Plaintiff/Appellants filed this action on September 17, 1999, alleging various constitutional violations. [ER, Vol. IV of IV, Tab: 32]

On September 20, 1999, after service of the original complaint, County Counsel sent a letter to the Board of Supervisors. The letter acknowledged service of the complaint in this lawsuit. County Counsel also advised the Board of Supervisors to adopt revisions to the Ordinance. Those revisions, which were subsequently adopted, included an exception for the possession of guns for use in any “*motion picture, television, video, dance or theatrical production or event.*” (County of Alameda, Cal., Gen. Code Title 9 § 12.120(f)(4) (1999)) [JSUF, ¶ 20. See also Attachment I to Appellants’ principal brief.]

It is reasonable to infer that the County thereby went from censoring the messages they disagree with that are conveyed by the possession of guns at gun shows (celebration of guns and gun culture), to sanctioning (perhaps reluctantly) the possession of guns by the

Scottish Caledonian Games and guns used in any “*motion picture, television, video, dance or theatrical production or event.*”⁵

The County enacted the revised Ordinance which is now the subject of this litigation on September 28, 1999. [JSUF, ¶ 22.]

After the trial court denied their request for a preliminary injunction, Plaintiff/Appellants were forced to cancel a gun show set for November 6/7, 1999. Then, because the Appellants could not produce a written plan for conducting a gun-less gun show, the manager of the fairgrounds cancelled all future dates reserved for gun shows, and returned Appellants’ deposits for all of the guns shows that had been scheduled for 2000. [JSUF, ¶¶ 27, 28, 29, 30]

The County still insists that gun shows can take place without guns, the Plaintiff/Appellants (who are in the gun show business) insist that gun shows cannot take place without guns. The trial court decided this *factual* controversy in favor of the County. That is plain error. This factual controversy is a triable issue. It is therefore not subject to summary adjudication. [ER, Vol. III of IV, Tab: 17, ER page: 0632, see footnote 13 of the Summary Judgment Order.]

Compounding that error, the trial court’s resolution of this issue

⁵ County of Alameda, Cal., Gen. Code tit. 9 § 12.120(f)(4) (1999).

contradicted prior determinations of this very issue by this panel and the California Supreme Court. In Nordyke v. King (“*Nordyke I*”), 229 F.3d 1266, 1268 (2000), this panel found that:

The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke’s, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there.

The California Supreme Court made an even stronger finding in Nordyke v. King (“*Nordyke II*”), 27 Cal. 4th 875, 882 (2002):

[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible.

Thus it is the law of this case is that the Ordinance makes gun shows without guns “*virtually*” impossible. When an appellate court decides a legal issue, whether explicitly or by necessary implication, that decision generally is not open to relitigation in subsequent proceedings in the same case. Chevron USA, Inc. v. Bronster, 363 F.3d 846, 849 (2004); United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186-1187 (2001); Leslie Salt Co. v. United States, 55 F.3d 1388, 1392-1393 (1995) – even summarily-treated issues become law of the case.

It is undisputed that the gun shows promoted and attended by the

Plaintiff/Appellants at the Alameda County Fairgrounds were free of any violent crimes and that the appellants have complied with all federal and state firearms laws. It is noteworthy that the Director of the Firearms Division of the California Department of Justice and one of his special agents testified that the Nordykes were in compliance with all federal and state laws regulating gun shows, including the Gun Show Enforcement Act of 2000.⁶ [JSUF, ¶¶ 43, 44, 49, 50, 85]

Plaintiff/Appellants do not now, nor have they ever, asserted the right to hold gun shows without regulation. The federal laws that the Appellants are in compliance with include, but are not limited to:

1. 18 USC § 923(j) regarding licensing and inspection.
2. Title 27 C.F.R. § 478.23 regarding inspections.
3. Title 27 C.F.R. § 418.100(b) regarding definitions.
4. Title 27 C.F.R. § 478.100(a) regarding posting of licenses.
5. Title 27 C.F.R. § 478.103 (d)-(f) regarding signage and prohibiting minors from possessing hand guns.
6. Title 27 C.F.R. § 100 (c) regarding recordation of sales.

The Gun Show Enforcement Act of 2000 (Cal. Pen. Code § 12021.4 (2000)) became law after the Nordykes were expelled from the Alameda Fairgrounds. The California Department of Justice testified that the Nordykes have been in compliance with this state law at all of their other gun shows throughout California. [JSUF, ¶¶ 49, 50, 51]

⁶ Cal. Pen. Code § 12071.4 (2000).

On the issue of public safety, which is really a pretext for banning guns shows, it is instructive to contrast those state laws regulating gun shows, with the Alameda County Ordinance and its policies regulating possession of guns on county property. [JSUF, ¶¶ 52 – 57]:

1. California Penal Code § 12071.4(b)(5) requires gun show promoters to verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a buyer.

Contrast this with the County’s policy of permitting the reenactors at the Scottish Games to actually load their guns with blanks and fire them during mock battles. Blanks are still ammunition. [JSUF, ¶ 41.]

2. California Penal Code § 12071.4(g) mandates that no person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.

Because they are not a gun show, no such requirement is imposed on the Scottish Games, the participants in the mock battles load blanks into their guns and fire them. [Id.]

3. California Penal Code § 12071.4(h) mandates that no member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.

No such requirement is imposed by the Ordinance or on the Scottish Games.

4. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).

Not required by the Ordinance.

5. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.

Not required by the Ordinance.

6. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:
 - (1) The gun owner's signature.
 - (2) The gun owner's printed name.
 - (3) The identification number from the gun owner's government-issued photo identification.

Not required by the Ordinance.

Appellants are entitled to the reasonable inference drawn from these facts, that gun shows *qua* gun shows are more strictly regulated under Federal and State Law, with regard to responsible gun possession and handling, than any requirement imposed by the Ordinance (and/or the County’s interpretation of the Ordinance) against the Scottish Caledonian games and/or any: “*motion picture, television, video, dance or theatrical production or event[s]*”⁷ – which continue to take place on county property with the County’s blessing.

Perhaps emboldened by Alameda’s early successes in this litigation, and the false impression created in the media that the case was over, the counties of Marin, Sonoma and San Mateo, and the city of Santa Cruz have enacted ordinances substantially the same and/or identical to the one challenged herein. [JSUF, ¶¶ 80, 87]

Gun shows at county fairgrounds in Northern California are in danger of becoming extinct, turning the gun culture and those people who promote and patronize gun shows into a disfavored group. *See generally: Romer v. Evans*, 517 U.S. 620 (1996).

The County’s stated purpose (pretext) for the Ordinance is the reduction of gun crime. But even the horrendous shooting that occurred

⁷ County of Alameda, Cal., Gen. Code tit. 9 § 12.120(f)(4) (1999).

at the fairgrounds during the County Fair (not a gun show) in 1998 would not have been prevented by the Ordinance. Jamai Johnson was already in violation of several state laws by bringing a concealed and loaded firearm to the county fair. He compounded that crime by his shooting rampage, violating at least all of the following state laws:

1. Crimes Against Public Justice [Penal Code §§ 171b, 171c, 171e, 186.20 et seq.];
2. Crimes Against the Person [Penal Code §§ 203, 205, 220, 225 et seq., 240, 242, 245, 246, 246.3, 247];
3. Crimes Against Public Health & Safety [Penal Code § 374c];
4. Crimes Against the Public Peace [Penal code §§ 403, 404.6, 415, 417, 417.1, 417.6];
5. Malicious Mischief [Penal Code § 602.1];
6. Miscellaneous Offenses [Penal Code § 647c]; and finally,
7. Control of Deadly Weapons [Penal Code §§ 12001.6, 12021.5, 12022, 12022.6, 12022.7, 12025, 12031, 12101].

These California Penal Code Sections address exactly the same public safety issues set forth in Alameda County Ordinance. How can a county ordinance, making it a misdemeanor to possess a gun on county property, prevent the crimes committed by thugs like Jamai Johnson, when he took no notice of the restrictions, duties and obligations required of him under existing state law – many with felony sanctions?

After the July 4, 1998 shooting, the County took steps to control deadly weapons at the fairgrounds by the simple expedient of installing metal detectors at the entrance to the fairgrounds. [JSUF, ¶ 48] In other words, there is a simpler, yet far more effective alternative solution for controlling deadly weapons on county property (at least for the fairgrounds) that does not involve banning gun shows.

The County's hostility toward (and targeting of) gun shows, is amply demonstrated by the undisputed fact that the Caledonian Scottish Games, is still permitted to possess firearms on county property for their cultural and expressive activities, while gun shows are still excluded. The County wants this Court to believe that the handling of firearms by the attendees of the Scottish Games is somehow different from that activity at a gun show. Not true.

As noted above, California's Gun Show Enforcement Act of 2000 is either stricter than, or substantially identical to the County's requirements for possessing guns in connection with a "*motion picture, television, video, dance or theatrical production or event.*"⁸ [See JSUF, ¶¶ 16, 17, 31, 39, 40, 41, 42] For comparison:

⁸ County of Alameda, Cal., Gen. Code tit. 9 § 12.120(f)(4) (1999).

| <u>Alameda Ordinance</u> <u>9.12.120(f)(4)</u> | <u>CA Penal Code § 12071.4</u> |
|---|--|
| Only authorized participants may handle guns. | See JSUF ¶¶ 52, 53, 54 and 56. |
| Firearms must be secure when not in actual use. | See JSUF ¶ 57. |
| Firearm must be lawfully used as part of the production or event. | See JSUF ¶ 3, 43, 44, 46, 47, 49, 50 and 85. |

The facts set forth in this statement thus far have addressed the mere possession of firearms on county property. No doubt the County will want to point out that “theoretically” the sale of guns on county property is not regulated by their ordinance – even though possession of a gun is still prohibited. This is the core of their argument that gun shows are not banned by the Ordinance. [JSUF, ¶¶ 46, 47] (See fn. 13 of the Summary Judgment Order. ER, Vol. III of IV, Tab 17.)

The undisputed facts are, that for the sale of a firearm to occur in compliance with federal and state law, a firearm must be physically inspected by both the buyer and seller to insure correct documentation of the serial number, make, model and caliber of the weapon. [JSUF, ¶38] Thus it is a reasonable inference that the Ordinance frustrates the policy of federal and state firearms laws, by encouraging sales in which the paperwork is not completed properly or accurately.

California laws regulating gun sales are more restrictive than federal law. All gun sales (except antique firearms) require a 10-day waiting period, a criminal background check, proof of safe storage, and proof of adequate safety training. [See: Cal. Pen. Code §§ 12070, 12071, 12071.1, 12071.4, 12072, 12088.1, 12088.15, 12088.] There is no “gun show loophole” for firearm sales in California. [JSUF, ¶ 86]

However the Alameda Ordinance obliterates a forum where law-abiding sales and other Second Amendment activities take place. Gun shows involve “significant” firearms sales. A recent Bureau of Alcohol, Tobacco and Firearms Report estimates that between one and two million guns are purchased at gun shows annually.⁹ As will be argued below, burdening the means of exercising a right, burdens the right.

Finally, throughout this case Defendant/Appellees have asserted that their Ordinance addresses public safety issues and mitigation of liability on public property for the criminal use of firearms. With respect to public safety issues at Plaintiff/Appellants’ gun shows, the

⁹ See: U.S. Dept. Of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Bureau of Alcohol, Taboacco, Firearms and Explosives’ Investigative Operations at Gun Shows* i (June 2007). Available at: <http://www.usdoj.gov/oig/reports/ATF/e0707/final.pdf> (The report estimates that between 2,000 and 5,200 gun shows take place annually with gun sales of 1,000 for the larger shows; making the 1 to 2 million annual sales figure seem conservative. The report itself is a survey of potential illegal activities at gun shows and ATF operations to address these activities. It is relevant to note, with regard to this case, that the San Francisco Office reported the lowest number of incidents, all occurring in Nevada.)

facts prove otherwise. The public entity liability issue became moot by the enactment of Public Law 109-92: Protection of Lawful Commerce in Arms Act in 2005.¹⁰ Defendant/Appellees are within the class of potential defendants protected against frivolous lawsuits seeking deep pockets for the criminal acts of third parties using firearms. *See: Request for Judicial Notice*, ER, Vol. III of IV, Tab: 13, ER pp., 0462.

ARGUMENT

A. Summary of Argument

The denial by the court below of our motion to amend the complaint to plead a Second Amendment claim can be defended only on one, or both, of two propositions: (1) the Second Amendment is not a viable individual right (the grounds the court actually relied on); and/or (2) that the right that is applicable only against the federal government, not against state or local governments.

The denial of the motion to amend was error, and the Ordinance violates the Second Amendment as that right is applied to the states through the 14th Amendment due process clause.

Additionally, the discrimination by the County against the

¹⁰ 15 U.S.C. § 7901-7903.

Plaintiff/Appellants' gun shows, based on the fundamental rights protected by the Second Amendment, cannot survive challenge under the 14th Amendment's equal protection clause as applied to an ordinance trenching on a fundamental right.

B. Procedural Posture of the Second Amendment Issues

Notwithstanding the disposition of the Second Amendment issues by the trial court at the pleading stage (i.e., before discovery and/or summary adjudication and/or trial), this case is procedurally postured to definitively resolve the Second Amendment issues without returning the case to the trial court. There are no disputed facts relating to the possession of guns on County property. Application of the Second Amendment to this Ordinance is a purely legal question. Moreover the County has had five years notice that this question would be raised in this Court based on a potential change of law. *See: S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 473 (2001); and *Gates v. Deukmejian*, 987 F.2d 1392, 1407-1408 (1992).

An appellate court has the discretion to consider issues that were not presented below where they [are] purely legal and did not rely on the factual record, and the opposing party had a full opportunity to

brief its response to them. Dream Palace v. County of Maricopa, 384 F.3d 990, 1005 (2004).

A court of appeals may consider a purely legal issue of statutory construction that was not raised in the district court because it was a question of first impression with broad implications. Emmert Indus. Corp. v. Artisan Assocs., Inc., 497 F.3d 982, 985-986 (2007).

THE SECOND AMENDMENT

The Second Amendment to the United States Constitution reads: “*A well regulated Militia, being necessary for the security of a free State, the right of the People to keep and bear Arms, shall not be infringed.*”¹¹

In 2003, this Court held that it was foreclosed from considering the Second Amendment issue by this Circuit’s precedent as articulated in Hickman, 81 F.3d 98 (1996). Nordyke III, 319 F.3d at 1192.

District of Columbia v Heller, 554 U.S. __ (2008), is now the law; vindicating the interpretation of the Second Amendment articulated by Judge Gould’s concurring opinion in Nordyke III, 319 F.3d at 1185, and his dissent along with Judge Kleinfeld’s dissent in Nordyke v. King (“Nordyke IV”), 364 F.3d 1025 (2004).

¹¹ U.S. Const. amend. II.

However, Heller, specifically left open the question of whether the Second Amendment applies against the states. Id., 554 U.S. at __ n.23.

A. The Incorporation Issue

There are three possible theoretical arguments for applying the Second Amendment against the states and local governments: First, that the Bill of Rights by itself is applicable against the states. This theory has been argued by various constitutional commentators (and judges¹²) but was rejected by the Supreme Court in the 19th Century¹³ and has remained the dominant doctrine ever since.¹⁴

The second possible theory is that the “privileges and immunities” clause of the 14th Amendment bodily incorporates the first eight amendments against the states. This theory has been argued by a number of dissenting justices (most notably Justice Black) and by an impressive number of commentators over the years. Lawrence (fn. 14 of

¹² Including Judge Kleinfeld of this Circuit. Silveira v. Lockyer, reh’g *en banc* denied 328 F.3d 567, 576 n.46. (2003).

¹³ Barron v. Baltimore, 32 U.S. 243 (1831).

¹⁴ The latest treatment asserts “most scholars are persuaded by the weight of the historical evidence that *Barron [v. Baltimore]* was correctly decided.” Michael A. Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 12 (2007).

this brief), in a recent scholarly discussion, ably marshals the argument for this theory. But, having reviewed the evidence, the preeminent historian of the Bill of Rights, Leonard Levy, pronounced the historical record mixed and murky.¹⁵

The third, and currently most persuasive, theory is that the Due Process Clause of the 14th Amendment selectively incorporates against the states those rights in the Bill of Rights which have historically been deemed “fundamental to the American scheme of justice” Duncan v. Louisiana, 391 U.S. 145, 149 (1968) – “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty....” Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted).

In considering whether a right is “fundamental to the American scheme of justice” the Supreme Court has examined such historical factors as: did the Founders deem the right fundamental; do most state constitutions recognize the right; was the right part of English common law; was it part of ancient Greek or Roman law. Duncan, 391 U.S. at 152-53.

¹⁵ Leonard W. Levy, ed., Kenneth L. Karst, ed., & Dennis J. Mahoney, ed., 2 Encyclopedia of the Constitution 971 (Macmillan Pub. Co., June 1990).

1. D.C. v. Heller Invalidates Fresno Rifle & Pistol Club v. Van de Kamp.

Defendant/Appellees will argue that this court is precluded from deciding the incorporation issue, as it was addressed by a prior Ninth Circuit panel, holding that the Second Amendment is not incorporated against the states by the Privileges and Immunities provision of the 14th Amendment. Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723 (1992). Appellees' position is understandable because all they have to rely on is authority naked of any rationale; as discussed *infra*, the only rationale for denying incorporation has been eliminated by Heller, 554 U.S. ____; 128 S.Ct. 2783 (2008).

The Heller decision substantially undercuts the authority of Fresno Rifle & Pistol Club, on the incorporation question. Heller, 128 S.Ct. at 2813 n.23, stated that the incorporation question is still an open one – directly contradicting the rationale in Fresno Rifle & Pistol Club which held itself bound by 19th Century cases denying incorporation.

Additionally, Fresno Rifle & Pistol Club, 965 F.2d at 725, limited its own holding to a “privileges and immunities” analysis.

The issue we urge on this court is that the Second Amendment applies against the states through the “due process” clause of the 14th Amendment. In contrast, Fresno Rifle & Pistol Club's holdings on

incorporation are: (a) by itself the Amendment does not apply to the states, but only the federal government; and (b) the Supreme Court has rejected the “[privileges and immunities] theory ‘that the entire Bill of Rights applies to the states through the fourteenth amendment.’”

Fresno Rifle & Pistol Club v. Van De Kamp, 965 F.2d at 731.

The dispositive point on this issue is that a Ninth Circuit panel revisiting this issue must follow the “mode of analysis” of subsequent Supreme Court’s decisions. In re Stern, 345 F.3d at 1043.

While the Fresno Rifle & Pistol Club Court’s mode of analysis rejects “privileges and immunities” incorporation, Heller, 554 U.S. ___, at fn. 23, suggests, and prior analysis in this case embraces 14th Amendment “due process” incorporation of specific rights. See: Nordyke III, 319 F.3d at 1193 n.3 (Judge Gould concurring).

Even the (now) obsolete case of Silveira v. Lockyer, 312 F.3d 1052 conceded the incorporation issue.¹⁶

¹⁶ Silveira, 312 F.3d at 1067: (Fresno Rifle itself relied on United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876) and Presser v. Illinois, 116 U.S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment’s Due Process Clause. Following the now-rejected Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), Cruikshank and Presser found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that Cruikshank and Presser rest on a principle that is now thoroughly discredited. See Emerson, 270 F.3d at 221 n.13.)

2. D.C. v. Heller Also Destroys the Theoretical Basis for Denying Incorporation.

The only theory that was ever available for such denial was that the Second Amendment creates a right of the states, not of individuals, and so cannot be held to apply against the states.¹⁷ Heller, 554 U.S. ___, refutes that theory and Appellee/Defendants have no other.

It remains only for us to address the dispositive points which are: (1) that the Fourteenth Amendment was specifically intended to make the Second Amendment applicable against the states; and (2) that the Second Amendment meets all the criteria that the Supreme Court has used to denote rights which are selectively applied to the states through the 14th Amendment Due Process Clause.

3. The Fourteenth Amendment Was Specifically Intended To Apply the Second Amendment Against the States.

The Fourteenth Amendment sought to eradicate the black codes, under which “Negroes were not allowed to bear arms. . . .” Bell v. Maryland, 378 U.S. 226, 248 n.3 (1964) (Douglas, J., concurring). As Professor Curtis’ treatise on the 14th Amendment tells us, that in the

¹⁷ Fresno Rifle & Pistol Club, 965 F.2d at 730 citing John E. Nowak & Ronald D. Rotunda, *CONSTITUTIONAL LAW* 332 (4th ed. 1991).

aftermath of Appomattox, “Southern legislatures passed Black Codes denying blacks many important liberties [including] the freedom . . . to bear arms.”¹⁸ Professor Cottrol similarly notes:

Such measures caused strong concerns among northern Republicans . . . that the South was trying to reinstate slavery and deny former slaves [basic civil rights]. The news that the freedmen were being deprived of the right to keep and bear arms was of particular concern . . . [, especially as these laws] preserved the right to keep and bear arms of former Confederates, while disarming blacks¹⁹

The Republican-dominated Congress, of 1866 responded with the Civil Rights Act of 1866 and the 14th Amendment. In its debates “Congressman after Congressman, including the Senate sponsors of both the 1866 Act and the fourteenth amendment, expressed their outrage at the denial of the freedmen’s right to arms.”²⁰

Whatever may be the case regarding the rest of the Bill of Rights, there is no intellectual dispute that the 14th Amendment was intended to protect the right to arms against state and local authorities. While no

¹⁸ Michael K. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 35 (Durham, N.C.: Duke University Press, 1986).

¹⁹ Robert Cottrol, *Gun Control and the Constitution* xxii (Taylor and Francis, 1993).

²⁰ Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 20, 256 (1983). (Compare Curtis, *supra* at 104, (“the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech... due process ... *and to bear arms*” – italics added) and the debate he describes and quotes in *No State Shall Abridge* at pp. 52, 53, 56, 72, 88, 140-41, and 164.)

court has ruled on the point, scholars agree that the Fourteenth Amendment was specifically intended to guarantee the freedmen's right to arms against the states.²¹

The same Congress which adopted the Fourteenth Amendment enacted the Freedmen's Bureau Act requiring states to provide the "full and equal benefit of all laws ... including the constitutional right to bear arms. . . ." ²² This Act, and the companion Civil Rights Act of 1866, sought to guarantee the same rights as the Fourteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24, 436 (1968).

4. The Second Amendment Meets All the Criteria the Court Has Enunciated for Due Process Incorporation .

A principal determinant of a Bill of Rights provision being so historically fundamental that Due Process incorporates it against the

²¹ In addition to Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*, at 104 and Cottrol, *supra* and Kates, *supra*, see Eric Foner, *Reconstruction: America's Unfinished Revolution* 258 (Harper & Row, 1989); Oxford Companion to the United States Supreme Court 763 (Oxford U. Press, 1992); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L. J. 57, 70 n.72, 98 (1993); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236, 1251-53 (1994); L. A. Scot Powe, Jr., *Guns, Words and Interpretation*, 38 Wm. & M. L. Rev. 1311, 1346-47, 1375-76 (1997); *see also*: Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and The Right to Bear Arms, 1866 – 1876*. (Praeger Publishers, 1998).

²² Freedmen's Bureau Act, § 14, 14 Stat. 176 (July 16, 1866).

states, is the Founders' attitude toward the right. *Duncan*, 391 U.S. at 152-53.

Suffice it to say that today's liberal intellectual distaste for guns and self-defense radically departs from 18th and 19th Century European and American thought. Self-defense was then viewed not just as a fundamental right but as the single most important human right; and the right to arms was deemed an integral part of that right.²³

Nor is our case dependent wholly on 18th and 19th Century thought. The indicators of modern acceptance includes the opinions of various judges of this Circuit, and almost all modern philosophers who have addressed the issue, that the right of self-defense implies a right to have a gun.²⁴

In sum, the Founders, the authors of the 14th Amendment, and the preceding Greek, Roman and English law all deemed the right to arms of fundamental importance.

²³ See Don B. Kates, *The Second Amendment and the Ideology of Self-Protection* 9 Constitutional Commentary 87, 90-94 (quoting Hobbes, Montesquieu, Blackstone, Algernon Sidney, Cesare Beccaria and Thomas Paine, among others) and Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment* 45 Emory L. J. 1139 at 1176-79 (1996) (quoting Sam Adams and others from the Founding era).

²⁴ *Nordyke IV*, 364 F.3d at 1037 n.17.

5. The Right to Self-defense – and the Integral Right to Possess Arms for Self-defense – Are “Fundamental to the American Scheme of Justice.”²⁵

Late 18th Century Americans were familiar with (indeed were the intellectual heirs of) earlier writers who deemed the right of self defense the cardinal human right – and saw it as encompassing the “auxiliary right” to be armed.²⁶ They saw the right to arms as inherent in and inextricable from the sacrosanct right to self-defense.²⁷

²⁵ Duncan, 391 U.S. at 145.

²⁶ Blackstone “constituted the preeminent authority on English law for the founding generation.” Alden v. Maine, 527 U.S. 706, 715 (1999). It was Blackstone who first described the right to arms as “auxiliary,” an **indispensable** appendage of the right to self-defense. 1W. Blackstone, Commentaries 143. Compare Hobbes, Leviathan, ch. XIV, p. 66: “A Law of Nature (Lex Naturalis) is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his own life, *or taketh away the means of preserving the same....*” (Emphasis added.) Compare also Locke’s assertion that by the laws of nature everyone is both: a) “*bound to preserve himself* and ...”; b) “may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the preservation of the Life, the Liberty, Health. Limb or Goods of another.” Quoted by Nelson Lund, “The Second Amendment, Political Liberty and the Right to Self-Preservation”, 39 ALA. L. REV. 103, 118, n. 35 (1987) (italics by Locke; our underlining).

²⁷ Typical are the Virginia Declaration of Rights (“That all men... have certain inherent Rights [including] *the Means of ... pursuing and obtaining ... Safety*”) (Quoted in Stephen Halbrook, The Founders’ Second Amendment: Origins of the Right To Bear Arms 129 (2008), emphasis added) and Sam Adams’ listing of the “Natural Rights of the Colonists as Men,” as including the rights to life, liberty and property “together with *the right to support and defend these in the best manner they can.*” (Emphasis added.) Sam Adams’ February 27, 1769 letter to the *Boston Gazette* quoted Blackstone that “To vindicate these rights,... when actually violated or attack’d,” the last resort was “to the right of having and using arms for self-preservation and defence.” Scott J. Hammond, Kevin R. Hardwick, and Howard Leslie Lubert, *Classics of American Political and Constitutional Thought* 226 (Hackett Publishing, 2007). For other examples, see Joyce Lee Malcolm, To Keep and Bear Arms: the Origins of An Anglo-American Right 149 (Cambridge, Harvard U. Press: 1994); Don B. Kates, *The Second Amendment and the Ideology of Self-Protection* 9 Constitutional Commentary 87; and Barnett & Kates, *supra*.

Self-defense was understood by the Founders and their intellectual forebearers to include self-defense against not just criminal violence, but also against genocide and other governmental violence. As Algernon Sidney put it: “the violence of a wicked magistrate who, having armed a crew of lewd villains” subjects people to murder, pillage and rapine.²⁸ Compare Roger Sherman’s avowal that he “conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made.”²⁹

Late 18th Century Americans saw the right to “keep and bear arms” for self-defense as so integral to the right to self-defense that they did not even see a distinction between them. Epitomizing this lack of any perceived distinction is the following from a 1790 lecture by James Wilson, a Supreme Court justice and law professor who had written the Pennsylvania Constitution. He offered the following explanation of why deadly force may be used to repel homicidal attack:

[I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly

²⁸ Algernon Sidney, *2 Discourses on Government* 246 (New York: Richard Lee, 1805).

²⁹ Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 262.

recognized in the Constitution of Pennsylvania: “The right of the citizens to bear arms in defense of themselves and the state shall not be questioned.”³⁰

District of Columbia v. Heller cites many early commentaries and court opinions that, like Wilson, equated the right to arms with the right to self-defense from which it derives. *Id.*, 128 S.Ct. at 2792 n.7, 2793, 2817, 2820.

Such views are not confined to the 18th and 19th Centuries. Consider at least two modern opinions by judges of this Circuit that are in accord. In *United States v. Gomez*, 92 F.3d 770, 774 n.7 (1996) Judge Kozinski opined that the Second Amendment embodies the right of self-defense. In 2003 four judges of this circuit asserted, in arguing that the right to arms applies against the states that:

A substantial part of the debate in Congress on the Fourteenth Amendment was its necessity to enable blacks to protect themselves from White terrorism and tyranny in the South. Private terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments’ refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms. When the state itself abets organized terrorism, *the right of the people to keep and bear arms against a tyrant becomes inseparable from the right to self-defense.*³¹ (footnotes omitted, italics added)

³⁰ James Wilson, *The Works of the Honourable James Wilson*, L.L.D.3:84 (Bird Wilson, ed., 1804).

³¹ *Silveira*, 328 F.3d at 577 (emphasis added) – Kleinfeld, C.J., joined by Kozinski, O’Scannlain, & Nelson, dissenting from denial of rehearing *en banc*.

6. America's Founding Fathers Saw the Right to Arms
As So Fundamental That They Deemed a
Government Which Disarmed its People as Bent on Tyranny.

In late eighteenth century America such views were embraced universally across the political spectrum by figures as diverse (and often antagonistic) as James Madison, John Adams, Sam Adams, Thomas Jefferson, James Monroe, Patrick Henry, and Thomas Paine.³²

Typical was a 1776 article in the *Pennsylvania Evening Post* which denounced any legal “inhibition of bearing Arms” as “the most flagitious Characteristic of abject Slavery.”³³ The theme that a government attempting to disarm its people was proof of its evil intent is clearly reflected in the following contemporary quotations:

- JOHN ADAMS [citing Aristotle for the proposition that it is necessary]: “to place the use of and exercise of arms in the hands of the people, because the commonwealth is theirs who hold the arms...”³⁴

³² See Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, (hereinafter “Original Meaning”) 82 Mich. L. Rev. 203, 228-230 (1983); Kates *Ideology of Self-Protection*, *supra*; and Barnett & Kates, *supra*.

³³ Stephen Halbrook, *The Right to Bear Arms in the First State Bills Of Rights* 10 Vt. L. Rev. 225, 270 (1985).

³⁴ Stephen Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (2008) at 188-89.

- GEORGE MASON: “to disarm the people; that it was the best and most effectual way to enslave them...”³⁵
- PATRICK HENRY: “The great object is that every man be armed... Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force you are ruined.” ³⁶
- ST. GEORGE TUCKER: called the right to arms “the true palladium of liberty” and wrote that where it “is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.” ³⁷
- TENCH COXE: “Their swords, and every other terrible implement of the soldier, are the birth right of an American.... [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but where I trust in God it will ever

³⁵ Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 223.

³⁶ Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 219; Debates and Other Proceedings of the Convention of Virginia...taken in shorthand by David Robertson of Petersburg, 275 (2nd ed., Richmond1805).

³⁷ St. George Tucker, Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 300 (1803) (republished by Dennis & Co. of Buffalo, N.Y., 1965).

remain, in the hands of the people.”³⁸

- A Maryland patriot writing in 1774: “[In free governments] there is not the slightest difficulty or jealousy about putting arms into the hands of every man in the country.”³⁹
- JOSEPH STORY: “One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms.”⁴⁰
- NOAH WEBSTER: “Before a standing army can rule the people must be disarmed as they are in almost every kingdom in Europe.”⁴¹

18th Century Americans consistently demanded that the right to arms be written into the Constitution. In ratifying that document several of the state conventions recommended the addition of a bill of rights and specified the rights it should guarantee. The only provisions common to all these bill of rights demands were freedom of religion and

³⁸ Stephen Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 68-69 (1983).

³⁹ Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 50.

⁴⁰ J. Story, *A Familiar Exposition of the Constitution of the United States* 264 (1859) (republished, 1893).

⁴¹ Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 177.

the right to arms. Of the state ratifying conventions that recommending a bill of rights, five suggested a right to arms.⁴² Only four mentioned due process,⁴³ or sought a prohibition on cruel and unusual punishment,⁴⁴ or requested that the right to assemble for redress of grievances be guaranteed.⁴⁵ By way of further comparison, only three mentioned free speech⁴⁶ and/or the various specific criminal procedure rights – except for double jeopardy, which only New York mentioned.⁴⁷

We know what late eighteenth century Americans believed about the right to arms from recorded debates, public proclamations, legal treatises, newspaper commentaries, articles and the private notes and correspondence of legislators. Late eighteenth century Americans saw that right to arms as among the most fundamental of rights – the lynchpin of all rights. See also historian Robert Churchill’s extensive

⁴² Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington: n.p. 1836), 1:326 (New Hampshire), 3:659 (Virginia), 1:328 (New York), 1:335 (Rhode Island), 4:244 (North Carolina).

⁴³ Elliot, *Debates*, 1:326 (New Hampshire), 3:658 (Virginia), 1:328 (New York), 1:334 (Rhode Island).

⁴⁴ Elliot, *Debates*, 1:328 (New York), 1:335 (Rhode Island), 3:658 (Virginia), 4:244 (North Carolina).

⁴⁵ Elliot, *Debates*, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina).

⁴⁶ Elliot, *Debates*, 1:335 (Rhode Island), 3:659 (Virginia), 4:244 (North Carolina).

⁴⁷ Elliot, *Debates*, 1:328 (New York).

review of such evidence concluding that late 18th Century Americans believed the right to arms a vital and inviolable incident of their citizenship.⁴⁸

Our Founding Fathers looked back to classical Greece and Rome as the prime exemplars of free republican government.

In the Greek and Roman republics from whose example they took so many lessons, every free man had been armed so as to be prepared both to defend his family against outlaws and to man the city walls in immediate response to the tocsin's warning of approaching enemies. Thus did each citizen commit himself to the fulfillment of both his private and his public responsibilities.⁴⁹

Our founders, were steeped in Aristotle's teaching that free government depends on an armed people, while oligarchies and tyrannies "mistrust the people and therefore deprive them of their arms."⁵⁰ The founders embraced Aristotle's view that confiscation of the Athenians' personal arms had been instrumental to the tyrannies of the

⁴⁸ Robert Churchill, *Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment* 25 Law & His Review 1, 139-175 (2007).

⁴⁹ Don B. Kates, *The Second Amendment and the Ideology of Self-Protection* 9 Constitutional Commentary 87. (For a review of Greek and Roman thought and practice see ch. 1 in Stephen P. Halbrook, *That Every Man be Armed: The Evolution of a Constitutional Right* (1984).)

⁵⁰ Aristotle, *The Politics* 218 (J. Sinclair trans. 1962).

Pisistratids and the Thirty.⁵¹ Likewise, they were students of Cicero, see Justice Wilson's lecture quoted *supra* invoking Cicero's dictum:

[I]f our lives are endangered by plots or violence or armed robbers or enemies, any and every means of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice too – and meanwhile they must suffer injustice first.⁵²

7. Modern American Thought Embraces the Right to Self-defense And to Possess and Use Guns for That Purpose.

Defendant/Appellees will deny that the rights to self-defense and to be armed for self-defense are fundamental and they will assert that those rights are more controversial today than they were in 18th and 19th Century America. This is only true as to activists of the gun control (ban) movement who deeply oppose the right of self-defense.⁵³

⁵¹ Aristotle, *The Athenian Constitution* 47, 105 (H. Rackham trans. 1935).

⁵² Stephen Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (2008) at 203.

⁵³ For instance, Prof. Garry Wills, decrying "individual self protection" as "anti-social behavior", vituperates those who own guns for self-defense as "anti-citizens", "anti-patriots", "enemies of their own *patriae*." Professor Wills' view is that "Mutual protection should be the aim of citizens, *not individual self-protection*. Until we are willing to outlaw the very existence or manufacture of civilian handguns we have no right to call ourselves citizens or consider our behavior even minimally civil." Prof. Wills is a nationally syndicated newspaper columnist. The views quoted are set out and reiterated in: Garry Wills: "NRA is Complicit in the Deaths of Two Children", *Detroit free Press*, (Sept. 6, 1994); "Or Worldwide Gun Control" *Philedelphia Inquirer*, (May 17, 1981); "Handguns that Kill", *Washington Star*, (Jan. 18, 1981); and "John Lennon's War", *Chicago Sun-Times* (Dec. 12, 1980). Similar views from gun ban advocates are collected in Barnett & Kates, *supra*, 45 Emory L. J. at 1254-58.

Wholehearted approval of deadly force self-defense remains the American norm and opposition to it remains an aberrant (though high decibel) minority. Consider the following:

- Almost all American philosophers who address the issue concur that the right of self-defense implies a right have a gun.⁵⁴
- In the amicus briefing for *Heller*, thirty-two states advised the Supreme Court that the Second Amendment “is properly subject to incorporation.” *Brief of Amici States Texas, et al.*, Supreme Court No. 07-290, at 23 n. 6.
- Roughly 40 states now allow anyone who is legally qualified to own a handgun to carry it concealed for self-defense.⁵⁵
- Another indicator of incorporation is how the states themselves have treated the right. *Duncan*, 391 U.S. at 150. In fact, 44 of the 50 state constitutions guarantee a right to arms; and of these

⁵⁴ Lance Stell, *Self Defense and Handgun Rights*, J. L. Econ. & Pol’y (2006); Michael Huemer, *Is There A Right to Own A Gun* 29 Social Theory & Practice 297-324 (2003); Samuel Wheeler, *Gun Violence and Fundamental Rights* 20 Criminal Justice Ethics 19-24 (2001); Lance Stell, *Gun Control and the Regulation of Fundamental Rights* 20 Criminal Justice Ethics 28-33 (2001); Lester Hunt & Todd C. Hughes, *The Liberal Basis of the Right to Bear Arms* 14 Public Affairs Q. 1-25 (2000); Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance* 11 Public Affairs Q. 431 (1997); and *Arms as Insurance* 13 Public Affairs Q. 111 (1999).

⁵⁵ This NRA computation is found at:
<http://www.nraila.org/Issues/FactSheets/Read.aspx?id=18&issue=003>

provisions, fifteen are either new or strengthened since 1970.⁵⁶

Also relevant is the trend against the retreat rule which limits self-defense by requiring a person attacked outside his/her home by a rapist, robber or other criminal to retreat if possible before using deadly force in self-defense. In America the retreat rule was always a minority rule, and, indeed, a shrinking one.⁵⁷ In the last three years 22 states have enacted an NRA-promoted statute abolishing the retreat rule and strengthening the right to use arms in self-defense.

Even California's laws create an evidentiary presumption of self-defense in favor of the homeowner if the attacker forcibly enters a residence; and a finding that a homicide was justifiable self-defense, entitles the defendant to an acquittal.⁵⁸

Modern trends strengthening the law of self defense are not confined to the United States. Also of interest is the trend of European laws authorizing deadly force self-defense beyond even the most

⁵⁶ Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. Law & Pol. 191 (2006).

⁵⁷ Don B. Kates & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C.-Davis L. Rev. 873 (1982). (Until recently there were roughly 17 retreat states and 33 which did not require retreat.)

⁵⁸ Cal. Pen. Code §§ 197, 198, 198.5, 199.

permissible American rules.⁵⁹

Is the right to self-defense fundamental to our law? In the words of one of the great figures in American law, it is a “universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims.”⁶⁰ It appears that every legal system in the world recognizes the right of self-defense, including deadly force, to preserve life against murderous aggression.⁶¹

Thus the right to self-defense – including the right to arms for self-defense – is both “fundamental to the American scheme of justice,” and “necessary to an Anglo-American regime of ordered liberty,” *Duncan*, 391 U.S. at 145 and 149 n.14). Compare *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) : “no right is held more sacred, or is

⁵⁹ Belgium, England, France, Germany, Holland and Italy recognize as exonerating defensive use of deadly force one or the other or both of two circumstances which American law does not accept: a) honest but unreasonable mistake; or b) that the accused’s unreasonable and excessive response to being victimized was caused by extreme fear or other passion. Renee Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J. L. Econ. & Pol’y ____ (2007); T. Markus Funk, *Justifying Justifications*, 19 Oxford J. Leg. Stud. 631, 635, 639ff. (1999); T. Marcus Funk, *Self-defense: A Comparative Analysis of the Kosovo Criminal Code*, 8 Kosovo Legal Studies 1 (2005).

⁶⁰ Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 736 (1937).

⁶¹ Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 Va. L. Rev. 999 (2005) (“the right to self-defense is recognized in all jurisdictions”); *see also* George P. Fletcher, *With Justice for Some* (Perseus Books 1995) (discussing self-defense as a justification in American, European and Israeli law).

more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”

8. The Second Amendment “Codified a Right Inherited from Our English Ancestors.”

The heading above is a partial quotation from *Heller*, 128 S.Ct. at 2802; in other parts of that opinion we find: “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.” *Heller*, 128 S.Ct. at 2798. The violation of that right by George III “provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.” *Heller*, 128 S.Ct. at 2799.

It is sometimes asserted that before Henry VIII the early common law had no right of “self-defense.” This is highly misleading, combining misnomers and misunderstandings. The legal concept we call “self-defense” consists of two quite discrete concepts: (a) the right to defend self and family by resisting deadly force with deadly force; and (b) the right to use deadly force to prevent the commission of a felony (against anyone, including the defender) and/or the escape of the felon. Concept

(a) was significantly qualified by the law of “affray.” One who got into a bar fight (affray) and killed another presumptively good person was guilty of “excusable” (not justifiable) self-defense. An excusable homicide verdict only pardoned the killer, but with the loss of all his worldly goods. And the excusable homicide concept applied even if the decedent had started the fight and escalated it to deadly force.

But no such qualifications applied to concept (b). One who killed a felon to prevent a felony (including rape, robbery or murder even if directed against the defender or her family) or to prevent his escape, had done what she was both entitled and required to do, ergo she was exonerated on grounds of justifiable homicide.⁶²

The possession of arms was a matter of right – the hallmark of being a free person – at early common law. But with this right came a grave responsibility. Armed subjects were supposed to use deadly force if needed to prevent felonies being committed or felons escaping. If a village neglected to answer the “hue and cry” and capture (or kill) the felon, the entire village was subject to punishment.

By the 17th Century more and more land was being fenced in by

⁶² Kates, *Original Meaning*, 82 Mich. L. Rev. at 214-15; Don B. Kates, *The Second Amendment: A Dialogue* 49 Law & Comtemp. Probs. 143 n.24 (1986); and Joyce Lee Malcolm, *Guns and Violence: The English Experience* (Harvard, 2002).

wealthy owners, leaving only the forests for peasants to hunt, which was an important part of the peasants' subsistence. But the forests were the exclusive hunting preserve of the king and the nobility, and hunting therein by peasants became the crime of poaching. By 1671 the nobles had managed to force through a law forbidding guns to people of less than great wealth.

Then during the reign of the Catholic James II, attempts were made to disarm the now overwhelming majority of Protestants including wealthy and noble Protestants. This led to the "Glorious Revolution" in which the Protestant King William III, was invited to take the throne – but only if he agreed to a Bill of Rights which included a right to arms exclusively for Protestants.

Thereafter it became a cornerstone of English liberty that the subjects could have arms:

And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular and free course of justice in the courts of law; next, to the right of petitioning the King and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defense.⁶³

This concept was enthusiastically embraced in his study of English

⁶³ See: *Blackstone's Commentaries* at: 1 Commentaries 121, 143-4; see also: 3 *Commentaries* 4.

government by DeLolme, a Swiss emigrant, so influential with late 18th Century Englishmen and Americans that he was commonly called “the English Montesquieu.”⁶⁴ It was still a truism in 1850 when “the great Whig historian Thomas Macauley maintained that [the citizen’s right to possess their own arms] was ‘the security without which every other is insufficient.’”⁶⁵ In a book on English liberty published nearly forty years later, James Patterson wrote that: “in all countries where personal freedom is valued, however much each individual may rely on legal redress, the right of each to carry arms – and these be the best and the sharpest – for his own protection in case of extremity, is a right of nature indelible and irrepressible.”⁶⁶

B. Second Amendment Rights of the Plaintiff/Appellants

We turn now to the Ordinance’s specific infringements on the Second Amendment rights of the Plaintiff/Appellants as it relates to their activities at gun shows at the Alameda County Fairgrounds.

⁶⁴ Joyce Lee Malcolm, *To Keep and Bear Arms* (1994) at 166.

⁶⁵ Joyce Lee Malcolm, *To Keep and Bear Arms* (1994) at 169.

⁶⁶ Joyce Lee Malcolm, *To Keep and Bear Arms* (1994) at 169-70.

1. The Ordinance Violates the Second Amendment Right of Eligible Buyers to Acquire Firearms.

While gun shows involve many activities, the principal ones are: exhibiting firearms as objects and symbols; displaying them for sale; and selling them to eligible purchasers. As noted in the Statement of Facts, California law regarding firearm transactions are stricter than federal law, and applicable to all gun shows.

The right to sell and acquire guns is implicit in the Second Amendment as construed by *Heller*. Compare Carey v. Population Services International (1977) 431 U.S. 678, 688 (that voided a state law allowing contraceptive sales only through pharmacies), because, as the Court explained:

state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision [fall athwart the same constitutional problem] as is applied to state statutes that prohibit the decision entirely....

Gun shows involve “significant” firearms sales. A report by the Bureau of Alcohol, Tobacco and Firearms suggests that between one to two million guns are purchased at gun shows annually.⁶⁷

⁶⁷ See: The Bureau of Alcohol, Taboacco, Firearms and Explosives' Investigative Operations at Gun Shows; June 2007 available at <http://www.usdoj.gov/oig/reports/ATF/e0707/final.pdf>

Compare cases in which anti-abortion groups tried to distinguish the abstract right to abortion from a women's actual access to the abortion facilities whose doors the groups were physically blockading. Like Defendant/Appellees here, the anti-abortion groups claimed they were only affecting the facility; but that the right to abortion still existed even if access to a particular facility was impeded. The courts rejected that argument as nonsensical quibbling: [it] "would be a mere mockery under the law if the courts allowed [the right's] individual exercise to be [so] challenged" *Planned Parenthood v. Aakhus* (1993) 14 C.A. 4th 162, 172; *Feminist Women's Health Center v. Blythe* (1993) 17 C.A. 4th 1543, n.7.

An intended consequence of the Ordinance was banning gun shows at the fairgrounds. Banning gun shows, bans the sales of guns to law-abiding adults at those gun shows. The Ordinance violates the Second Amendment rights of law-abiding adults to acquire arms.

2. Banning Guns, Is Not A Government Interest that Outweighs Any Individual Rights Under the Second Amendment.

It has already been established that the purpose of this Ordinance was to make gun shows (and sales at gun shows) "*virtually*" impossible.

That finding alone makes the challenged ordinance invalid on Second Amendment grounds. Defendant/Appellees' own words confirm its invalidity because its author stated that the purpose of the Ordinance was to ban gun shows from county property in order to deny a public forum to those in the gun culture. Appellees have also tried to provide an alternative basis (pretext) for their law: reduction of crime. In the press releases and findings of the Ordinance, Appellees have intimated that reducing the number of guns (and by extension gun sales) on county property, the Ordinance will reduce crime.

But the Supreme Court made clear that inhibiting gun sales and firearm possession among the law-abiding adult population is not a permissible means of trying to reduce crime and/or accidents. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 128 S.Ct. at 2822.

3. The Ordinance Violates the Right to Possess Arms as That Right Is Recognized under the Second Amendment.

The opinion in *Heller* provides extensive guidance about the scope of the rights protected under the Second Amendment, which includes the right to "keep" arms. *Heller*, 128 S.Ct. at 2791 *et seq.*

Judge Gould’s concurrence anticipated the discussion in Heller:

[...] Because literally a right to “keep” arms means a right to possess arms, *Silveira*’s argument, to the extent that it rests on a distinction between “keep” and “possess,” is not persuasive.⁶⁸

Heller goes on to suggest that the right to possess firearms is not without restrictions as to “sensitive places such as schools and government buildings.” Heller, 128 S.Ct. at 2817. But California law specifically exempts government buildings in which gun shows takes place in compliance with federal and state laws. Cal. Pen. Code §§ 171b(b)(7)(A) and 171b(b)(7)(B).

Because the Ordinance violates the rights of gun show exhibitors, patrons and attendees to keep/possess guns at properly regulated gun shows, it violates the Second Amendment.

4. The Ordinance Violates Both the Second Amendment and the Strict Scrutiny Equal Protection Standards Applicable to Discrimination Affecting a Fundamental Rights.

Under the facts of this case, the right to arms coalesces with the requirements of strict scrutiny equal protection. Strict scrutiny applies because the Ordinance discriminates against Plaintiff/Appellants’ use of a public forum based on possession of firearms – such possession having

⁶⁸ Nordyke III, 319 F.3d at 1195

now been recognized as a fundamental constitutional right.⁶⁹ The Ordinance effectively excludes gun shows from a public forum which accommodates all other kinds of shows, including the Scottish Games. This Ordinance’s sponsor declared its intent is to ban gun shows because they promote “the gun culture.” Consistent with that purpose, the Ordinance is enforced only against gun shows while Appellees knowingly allow the Scottish Games to sidestep the Ordinance with their firearms being possessed, loaded and fired (albeit with blanks).

We recognize that counties need not provide forums for shows, carnivals, etc., but when counties do provide a forum, they may not exclude gun shows, absent some compelling government interest that survives strict scrutiny. The Ordinance violates equal protection.

5. The Challenged Ordinance Cannot Be Justified as a Public Safety Enactment.

Neither the Ordinance nor Defendant/Appellees’ application of it to gun shows can be defended on any public safety rationale. We do not just refer to Appellees’ admission that there has never been a crime problem

⁶⁹ Where government discriminates regarding a fundamental right, the distinction is subject to strict scrutiny. *McDonald v. Board*, 394 U.S. 802 (1969); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

at any of Plaintiff/Appellants' gun shows. After all, they have also conceded that the shows are conducted strictly in accordance with the stringent regulations of the California Gun Show Enforcement Act of 2000 and all applicable federal laws.

The state/federal gun show laws that Plaintiff/Appellants have been obeying set forth a plethora of public safety regulations, including that retailers may possess only unloaded firearms and the tight controls on ammunition for those firearms.⁷⁰ But the participants at the Scottish Games are allowed, not only to have ammunition in proximity to the guns they possess, they load and fire blank ammunition with their guns.

If gun shows at which firearms are displayed were some kind of public safety problem, the Ordinance should ban all gun shows in the county. But the Ordinance has the effect of precluding only those gun shows that occur on county property. And if just possessing and/or displaying unloaded firearms presents some kind of public safety problem, then every gun store in Alameda County is a threat to public safety. But here the Ordinance has been enforced only against gun shows that have been historically held without incident.

⁷⁰ Ammunition may be kept for sale but must be cased, i.e., not kept loose so as to be readily loadable into a gun. Cal. Pen. Code § 12071.4(d).

6. Heller Invalidates Prior Inconsistent Ninth Circuit Caselaw.

The orders we appeal from were expressly premised on this panel's prior opinion noting that courts in this circuit were bound by the adverse construction of the Second Amendment found in Hickman v. Block, 81 F.3d 98 (1996). Nordyke III, 319 F.3d at 1192.

That construction has now been invalidated by Heller, 128 S. Ct. 2783, which held that the Second Amendment is an individual right. The United States Supreme Court struck down Washington, D.C. gun control ordinances conflicting with that construction.

A Ninth Circuit panel is bound to follow the “mode of analysis” of Supreme Court decisions. In re Stern, 345 F.3d at 1043. If that mode of analysis conflicts with existing Ninth Circuit precedent, “a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.” Gammie, 335 F.3d at 900.

Hickman (and Silveira) were wrongly decided and are no longer good law for they contradict Heller, 554 U.S. _____. As the Second Amendment is applicable to state (and local) action, and as the trial court relied on Hickman for its rationale for denying Plaintiff/Appellants' motion to amend, that order must be reversed.

7. The Second Amendment Does Not Protect Lunatics, Children or Persons Convicted of Serious Criminal Offenses.

Before concluding we must confront a claim that Appellees have pressed throughout this case: that implementing the Second Amendment would give thugs like Jamai Johnson a right to arms.

Heller contradicts this, but without much discussion. See: Heller, 128 S.Ct. at 2816, 2817.

Two rationales exist for denying the protection of the Second Amendment to felons like Jamai Johnson: First – the Amendment guards the right to arms of “the people.” Violent felons were not among “the people” conceptualized by our Founding Fathers; under the law as they knew it, felons were “civilly dead,” having no right to own guns or any other property.⁷¹

Moreover the penalty for a felony was generally death which rendered the felon’s right to arms irrelevant. “Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually

⁷¹ A felon “could not own any property himself, nor could [his heirs] ... claim through him.” 3 William S. Holdsworth, *A History of English Law* 69 (3d ed.1927) (footnote omitted). At common law felons were essentially stripped of property and other rights: “A felon who had broken the social contract no longer had any right to social advantages, including transfer of property....” Vernon M. Winters, *Criminal RICO Forfeitures and the Eight Amendment: ‘Rough’ Justice Is Not Enough*, 14 Hastings Const. L.Q. 451, 457 (1987).

accompanied by death.” *State v. Hirsch*, 34 P.3d 1209, 1212 (2001);
accord: Posey v. Commonwealth, 185 S.W.3d 170 (2006).

Second, the classical republican thought which gave rise to the right to arms was inextricably and multifariously linked to *civic virtue*, i.e. the virtuous citizenry. Quoting *Hirsch*: “One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue.” *Hirsch*, 34 P.3d at 1212; *accord Posey*, 185 S.W.3d 170.⁷²

In sum, neither lunatics nor minors nor persons convicted of serious criminal offenses have Second Amendment rights.

CONCLUSION

Neither the Supreme Court nor the Ninth Circuit have ever ruled on the legal theory Appellants press on this court: that the Second Amendment is applicable to state and local government by virtue of the

⁷² See also Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L.Rev. 461, 480 (1995) (felons did not historically have a right to possess arms). See Don B. Kates, *The Second Amendment: A Dialogue* 49 Law & Comtemp. Probs. 143, 146 (1986); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Interpretation of the Second Amendment*, 49 Law & Comtemp. Probs. 151 (1986); and Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 Univ. of Dayton L. Rev. 59, 69 (1989).

14th Amendment's Due Process Clause. But the historical record is absolutely clear that the authors of the 14th Amendment intended to apply the Second Amendment to the states. And that right meets all the standards the Supreme Court has looked to in determining whether a right is made applicable to state and local government by Due Process. In sum, the right to self-defense, and the integral right to arms, is basic whether we look to: modern philosophy; late 18th Century American and English thought; the constitutions of the states; English common law; or the law of the ancient Greek and Roman city states.

This Court should find that the Alameda Ordinance violates the constitutional rights of the Plaintiff/Appellants under the First, Second and/or Fourteenth Amendments.

This Court should specifically find that the trial court was in error by denying Plaintiff/Appellants' motion to amend their complaint to plead a Second Amendment claim as that right is incorporated against state action by the 14th Amendment Due Process Clause.

Furthermore, this Court should find that the Alameda Ordinance, on its face, and as applied to the undisputed facts of this case, violates the "right to keep and bear arms" of the Plaintiff/Appellants as that right is protected by the Second Amendment.

This Court should also specifically find that the trial court was in error by finding no “equal protection” violation by Alameda County with respect to the fundamental rights of the Plaintiff/Appellants under the First Amendment. And If this court does not make an outright finding that the Ordinance violates equal protection of Appellants’ Second Amendment rights on the undisputed facts before this Court; it should provide the trial court, upon remand, with the necessary legal framework to analyze the “equal protection” protection question as applied the Second Amendment.

This Court should also find that the trial court was in error by granting Defendant/Appellees’ motion for summary judgment, because the Court was wrong on the symbolic speech issues, and/or there are trial issues of fact with respect to the First Amendment.

Respectfully Submitted, September 9, 2008.

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Date: September 9, 2008

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